

DEPARTMENT OF FOOD AND AGRICULTURE
PROPOSED CHANGES IN THE REGULATIONS

Title 3, California Code of Regulations

Section 3700, Subsection(c), Oak Mortality Disease Control

INITIAL STATEMENT OF REASONS/

POLICY STATEMENT OVERVIEW

Description of the Public Problem, Administrative Requirement, or Other Condition or Circumstance the Regulation is Intended to Address

This regulation is intended to address the obligations of the California Department of Food and Agriculture to protect the agricultural industry of California and prevent the introduction and spread of injurious plant pests.

Specific Purpose and Factual Basis

The specific purpose of Section 3700 is to provide authority for the State to mitigate the effects of oak mortality disease (sudden oak death) on the agricultural industry, which includes native tree stands, by establishing a program to arrest the artificial spread of the disease to additional areas; thereby protecting California's agricultural industry and environment. Subsection 3700(c), lists the articles and the commodities covered under this regulation.

The factual basis for the determination by the Department that the emergency amendment of Section 3700(c) was necessary is as follows:

The Department of Food and Agriculture has found that oak mortality disease (sudden oak death) caused by a fungus, *Phytophthora ramorum*, presents a clear and present danger to the native stands of oak and other trees, the nursery industry, other agricultural commodities and plant life (including ornamental plantings) of California. Section 3700 implements a program to arrest the artificial spread of the disease. Continued action is necessary to contain and minimize the destructive impact of this pest and disease at the earliest possible time. On April 9, 2004, the Administrator of the United States Department of Agriculture (USDA), Animal and Plant Health

Inspection Services (APHIS) issued the first emergency order restricting the interstate movement of nursery stock from California nurseries located outside the area regulated under Section 3700.

On April 22, 2004, USDA, APHIS issued a new order that replaced that issued on April 9, 2004. On April 23, 2004, USDA, APHIS issued a clarification of its April 22, 2004 order. Through this last federal emergency order and its subsequent clarification, the USDA, APHIS identified additional plant species as regulated associated articles and as such, these associated articles are prohibited interstate movement from all California nurseries unless properly certified under the provision of the federal emergency order.

Since April 2004, the USDA, APHIS has issued a series of federal emergency orders that amended the articles regulated including on: 1) August 5, 2004, 2) December 21, 2004, 3) August 3, 2005, 4) September 14, 2005, 5) November 15, 2005 (effective November 28, 2005), 6) February 10, 2006 (effective February 20, 2006), 7) March 14, 2006 (effective March 31, 2006), 8) July 17, 2006 (effective August 1, 2006), 9) September 21, 2006 (effective October 10, 2006) 10) a federal rule (effective February 27, 2007) and a federal order (effective September 7, 2007). As a result, it was necessary to make emergency amendments to the State's regulation governing the intrastate movement of hosts and associated articles (nursery stock) to be consistent with these federal orders and the federal rule. Without a parallel State regulation that is substantially the same as the federal domestic quarantine and related federal orders, the USDA cannot regulate less than the entire State.

The USDA has sent the Department advance notice that it intends to issue a new federal order in December 2007, which will be effective January 1, 2008. The USDA deemed this action necessary to amend its "associated hosts" list with two additional plant taxa that can be infected by *P. ramorum*.

This federal order will specifically affect the interstate movement of nursery stock from several states, including California. Under authority of this federal order, nurseries operating under a compliance agreement may continue to ship "Associated Plants" including these newly listed plants. Any nurseries containing these newly listed associated plants must be properly inspected,

sampled and tested and placed under a Compliance Agreement to be able to move plants interstate. This federal order will add two new plant species, *Corylopsis spicata* (spike winter hazel) and *Physocarpus opulifolius* (ninebark), to its “Plants Associated with *Phytophthora ramorum*” list. Therefore, to ensure harmonization with the federal order, these plants are also being added to Section 3700(c) as “associated articles.”

As this federal order will become effective on January 1, 2008, the Department is proposing these emergency amendments to Section 3700(c) to continue to provide the necessary regulatory framework for a State program to continue to arrest the intrastate and interstate spread of this disease and be in compliance with the anticipated federal order. It should be noted that these two additional “Associated Host Plants” are already listed by the USDA at the following website: http://www.aphis.usda.gov/plant_health/plant_pest_info/pram/. In order to prepare the affected industries, on December 11, 2007, the Department issued Phytosanitary Advisory No. 35-2007 to all county agricultural commissioners concerning the requirements of this upcoming federal order.

The Department proposes to amend this regulation because it is necessary to continue to have authority for an established statewide program in order to arrest the artificial spread of the disease to additional areas and harmonize the State’s regulation governing the intrastate movement of nursery stock with the latest federal order that governs the interstate movement of California nursery stock. Immediate amendment of this regulation is necessary to mitigate the effects of this disease on the agricultural industry, which includes native tree stands. Additionally, it is necessary to immediately amend this regulation to avoid more stringent federal restrictions being placed against the State to prevent the interstate movement of articles and commodities that may carry *Phytophthora ramorum*. The implementation of this proposed regulatory action by January 1, 2008, is necessary to harmonize it with the federal order and prevent the USDA, APHIS from considering the entire state as infested with *Phytophthora ramorum*, rather than just the current 14 regulated counties. If this were to occur, there would likely be additional detrimental quarantine requirements directed against California commodities by our international trade partners.

The Department has determined that *Phytophthora ramorum* is a serious forest pest for which control is required to prevent further spread and harm to forests, parks, commercial and urban landscapes, and watersheds. This disease is known to occur in 14 California counties. Oak mortality disease is serious due to the fact that it kills tanoak, coast live oak, and black oak trees. The pest has been confirmed as infecting Shreve's oak and non-oak species such as rhododendron, huckleberry, bigleaf maple, California buckeye, California coffeeberry, manzanita, and toyon and other hosts causing foliar and stem disease symptoms.

Phytophthora ramorum has the capability of causing significant irreparable harm to California's agricultural industry and environment. While the Department's compliance with the California Administrative Procedure Act and the California Environmental Quality Act (CEQA) are separate actions, they can be interrelated. Although adoption of specific regulatory authority can be the beginning of a project and therefore covered by CEQA, this regulation, for the reasons already set forth, constitutes a specific act necessary to prevent or mitigate an emergency as authorized by Public Resources Code section 21080, subdivision (b) (4) and Title 14, California Code of Regulations Section 15269, subdivision (c). The regulation is also an action required for the preservation of the environment and natural resources as authorized by Title 14, California Code of Regulations, sections 15307 and 15308.

The emergency amendments of Section 3700(c) established two new associated hosts that are regulated. To protect California's agricultural industry, it was necessary to immediately regulate movement of hosts and potential carriers that may transfer the pest from the infested area. Therefore, it was necessary to amend Section 3700(c) on an emergency basis in order to have it effective on January 1, 2008.

Estimated Cost or Savings to Public Agencies or Affected Private Individuals or Entities

The Department of Food and Agriculture has determined that Section 3700(c) does not impose a mandate on local agencies or school districts, except that the agricultural commissioner of a county under regulation has a duty to enforce it. No reimbursement is required under Section

17561 of the Government Code because the 14 affected county agricultural commissioners requested that when established as a new host or associated article by a federal order, Section 3700, subsection (c) be changed to reflect that.

The Department has also determined that the amended regulation will involve no additional costs or savings to any state agency, no nondiscretionary costs or savings to local agencies or school districts, no reimbursable savings to local agencies or costs or savings to school districts under Section 17561 of the Government Code, and no costs or savings in federal funding to the State.

The Department has determined that the proposed action will not have a significant adverse economic impact on housing costs. The Department of Food and Agriculture has made an initial determination that the proposed action will not have a significant, statewide adverse economic impact directly affecting California businesses, including the ability of California businesses to compete with businesses in other states.

The Department is not aware of any additional cost impacts that a representative private person would necessarily incur in reasonable compliance with the proposed action. There was an ongoing program in place prior to this emergency amendment of the regulation. After consulting with the known affected individuals/businesses and/or the county agricultural commissioners in the regulated area, the program concluded there are no anticipated new economic impacts or newly affected parties due to this proposed action.

Therefore, the proposed action will not result in any new costs for compliance for individuals/businesses previously regulated in the 14 counties prior to this emergency amendment. Therefore, the cost impact of the amended regulation on a representative business is not expected to be significantly adverse.

Assessment

The Department has made an assessment that this amendment to the regulations would not (1)

create or eliminate jobs within California, (2) create new businesses or eliminate existing businesses within California, or (3) affect the expansion of businesses currently doing business within California.

Alternatives Considered

The Department of Food and Agriculture must determine that no alternative considered would be more effective in carrying out the purpose for which the action is proposed or would be as effective as and less burdensome to affected private persons than the proposed action.

Information Relied Upon

The Department relied upon the following studies, reports, and documents in the amendment of Section 3700:

Email dated December 21, 2007, from Vince Arellano to Stephen Brown.

Email dated December 14, 2007, from Carolyn Pizzo to Amber Morris and its attachments; DA-2007-66, dated December 11, 2007, "*Phytophthora ramorum* (ramorum blight, ramorum dieback, sudden oak death): List and Regulation of Plants Reported with *P. ramorum*," Quarantine and Regulations, Richard L. Dunkle, Plant Protection and Quarantine.

Phytosanitary Advisory No. 35-2007, dated December 11, 2007, to All County Agricultural Commissioners from the Department of Food and Agriculture.

Facsimile transmission of a letter dated August 20, 2004 to Secretary A.G. Kawamura from David C. Frieders.

Facsimile transmission of a letter dated June 30, 2004 from Ronnie K. Eaton to Nick Condos.

Facsimile transmission of a letter dated June 30, 2004 to Dr. Dennis E. Mayhew from Steve Hajik.

Letter dated June 30, 2004 from David R. Whitmer to Dr. Dennis E. Mayhew.

Facsimile transmission of a letter dated June 30, 2004 to Dr. Dennis E. Mayhew from Stacy K. Carlsen.

Facsimile transmission of a letter dated June 30, 2004 to Dr. Dennis E. Mayhew from Edward P. Myer.

Letter dated June 28, 2004 from David W. Moeller to Dr. Dennis E. Mayhew.

Facsimile transmission of a letter dated June 28, 2004 to Dr. Dennis E. Mayhew from John Westoby.

Letter dated June 28, 2004 from Gail M. Raabe to Dr. Dennis E. Mayhew.

Letter dated June 25, 2004 from David Bengston to Dr. Dennis E. Mayhew.

Letter dated June 25, 2004 from Greg Van Wassenhove to Dr. Dennis E. Mayhew.

Letter dated June 25, 2004 from Susan Cohen to Dr. Dennis E. Mayhew.

Letter dated June 25, 2004 from Eric Lauritzen to Dr. Dennis E. Mayhew.

Letter dated June 24, 2004 from John E. Falkenstrom to Dr. Dennis E. Mayhew.